IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL REVISION APPLICATION NO. 55 OF 2007

Mahesh Mayekar,
s/o. Mohan,
R/o. H. No. 338, Assol,
Dongri, Dabolim,
Vasco. ... Applicant

versus

S T A T E
(Through P. P., Panaji, Goa) ... Respondent

Mr. Arun Bras De Sa, Advocate for the Applicant.

Mr. C. A. Ferreira, Public Prosecutor for the Respondent.

CORAM : N. A. BRITTO, J.

DATE : 4TH OCTOBER, 2007.

ORAL ORDER

Heard Mr. Arun Bras De Sa, learned Counsel on behalf of the Applicant/Accused and Mr. C. A. Ferreira, learned Public Prosecutor on behalf of the Respondent.

2. This revision is restricted to the order of refusal to extend the benefit of Section 3 of the Probation of Offenders Act, 1958(Act, for short) to the

accused whose conviction has been upheld, under Sections 354, 506(I) I.P.C. by the learned Sessions Judge, Margao, by Order dated 9-8-2002.

3. The allegation against the accused was that on 27-12-2002 between 14.45 hours to 15.00 hours at Assol, Dongri, Dabolim, the accused offered a chocolate to the victim, aged 10 years, and when she refused, the accused pulled her, lifted her and inserted his finger in her vagina causing bleeding injuries and thereby outraged her modesty.

4. The complaint was filed initially under Sections 354, 506 I.P.C. but by virtue of the supplementary statement of the victim, charge under Section 376 I.P.C. was framed but the accused has been acquitted of the latter charge.

5. Learned Counsel on behalf of the accused states that the accused was born on 23-1-1981 and therefore there is no dispute that as on the date of the incident the accused was above 21 years and 11 months of age while the victim was about 10 years of age, as stated by the learned Sessions Judge, in para 3 of the Judgment.

6. Learned Counsel on behalf of the accused, contends that the victim had thrown stones at the accused at a time when the accused was relieving himself and therefore this was a fit case to extend the benefit of Section 3 of the said Act. However, I must hasten to add that the story that the victim had thrown stones at the accused, before the accused did what he did, has not been

accepted by both the Courts below. Learned Counsel further submits that considering the young age of the accused who was then employed as a porter at the Airport, and, presently is also employed elsewhere and the nature of offence the benefit of Section 3 ought to have been extended to him. Alternatively, learned Counsel submits that the accused was detained for 14 days during trial and therefore the said period be considered as substantive sentence imposed upon the accused.

7. The benefit of Section 3 of the Act was claimed by the accused before both the Courts.

8. The learned Assistant Sessions Judge referred to **Dhananjoy Chatterjee** v. **State of West Bengal**(1994 2 SCC 220) wherein the Apex Court had observed that courts must not only keep in view the rights of the criminal but also the rights of the victim of the crime and the society at large while considering imposition of appropriate punishment and that justice demanded that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The Court also referred to **Ravji** v. **State of Rajasthan**((1996) 2 SCC 175) wherein a similar view was expressed. Reference was made to **Sakshi** v. **Union of India**((2004) 5 SCC 518) wherein the Apex Court had refused to enlarge the scope of Section 375 I.P.C. to non-traditional sexual offences and had stated that it was for the legislature to enlarge the scope of rape. Holding that the case at hand was heinous enough to come within the proposed enlarged definition of rape, though the same had not

been enlarged by the legislature, the learned Assistant Sessions Judge held that the case at hand did not deserve the application of the beneficial provisions of the Act nor could it be treated lightly so as to impose a sentence of fine only. In the appeal filed, the learned Sessions Judge, rejecting the benefit, observed that the material on record did not warrant any interference with the Judgment of conviction and sentence.

9. Learned Counsel on behalf of accused has placed reliance on **Jagat Pal Singh and others** v. **State of Haryana**(AIR 2000 SC 3622(1)). That was a case of conviction under Section 323 I.P.C. and benefit of Section 360 of the Code of Criminal Procedure, 1973(Code, for short) was extended to the accused. Reliance has also been placed on the case of **Darshan Kumar** v. **Secretary, Municipal Corporation**(AIR 1973 SC 906). However, the latter case does not disclose as to which offence the accused who was below 25 years of age was convicted before the benefit of Section 6 of the Act was extended to him.

10. Reliance is also placed on the case of **Dilip R. Umare** v. **State of Maharashtra**(1996 Cri. L. J. 721). The accused in that case was of 17 years of age at the time of commission of offence and was convicted under Section 354 I.P.C. and was extended the benefit of probation under Section 360 of the Code by directing his release on a bond of Rs.5000/- for maintaining good behaviour for a period of two years. Needless to say, the accused in this case was below 21 years of age.

11. The above cases relied upon on behalf of the accused do not advance the case of the accused at all, on facts. The accused in this case has been found to be more than 21 years of age at the time of commission of the offence.

12. Admittedly, the offences under which the accused is convicted are punishable with imprisonment which could extend to two years or fine or both and therefore could be dealt with under Section 3 of the Probation of Offenders Act which provides as follows:-

> "When any person is found guilty of having committed an offence punishable under Section 379 or Section 380 or Section 381 or Section 404 or Section 420 I.P.C. or any offence punishable with imprisonment for not more than two years, or with fine, or with both, under the Indian Penal Code, or any other law, and no previous conviction is proved against him and the Court by which the person is found guilty is of the opinion that, having regard to the circumstances of the case including the nature of the offence, and the character of the offender, it is expedient so to do, then, notwithstanding anything contained in any other law for the time being in force, the Court may, instead of sentencing him to any punishment or releasing him on probation of good conduct under Section 4 release him after due admonition.
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> The explanation provides that for the purposes of this Section, previous conviction against a person shall

> include any previous order made against him under this Section or Section 4 of the Act"(Emphasis supplied).

13. Admittedly, there is no previous conviction against the accused for similar or any other offence. Nevertheless, what was required to be seen, was the nature of the offence committed by the accused and whether it was expedient to release him on probation or with admonition. The trial Court has considered this aspect rightly.

14. The Apex Court in **Dalbir Singh** v. **State of Haryana**(AIR 2000 SC 1677) has stated that in the matter of release of a person convicted of an offence on probation of good conduct the Parliament has made it clear that it has to be only if the Court forms the opinion that it is expedient to release him on probation for his good conduct regard being had to the circumstances of the case. One of the circumstances which cannot be sidelined in forming the said opinion is "the nature of the offence" and Parliament has left it to the Court to decide when and how the Court should form such opinion and this has provided sufficient indication that releasing the convicted person on probation of good conduct must appear to the Court to be expedient and the said expression "expedient" has been thoughtfully employed by the Parliament so as to mean "apt and suitable to the end in view" in the context of casting a duty on the Court to take into account "the circumstances of the case including the nature of the offence".

15. In **State of Gujarat** v. **Jamnadas G. Pabri and others**(AIR 1974 SC 2233), the Apex Court speaking through two learned Judges has referred to the word “expedient” and has stated that the said word has several shades of meaning. In one dictionary sense it means “apt and suitable to the end in view”, “practical and efficient”; “politic”; “profitable”; “advisable”, “fit, proper and suitable to the circumstances of the case”. In another shade, it means a device “characterised by mere utility rather than principle, conducive to special advantage rather than to what is universally right”.

16. The Society in which we live today has become a sexually surcharged society and the crimes against women and children are ever on the increase. This was noticed in the case of **Dhananjoy Chatterjee** v. **State of West Bengal**(supra) referred to by the learned trial Court and on which reliance has now been placed by the learned Public Prosecutor. The Apex Court had noted that in recent years, the rising crime rate against women has made the criminal sentencing by the courts a subject of concern. Today there are admitted disparities. Some criminals get very harsh sentences while many receive grossly different sentence for an essentially equivalent crime and a shockingly large number even go unpunished thereby encouraging the criminal and in the ultimate making justice suffer by weakening the system's credibility. Of course, it is not possible to lay down any cut and dry formula relating to imposition of sentence but the object of sentencing should be to see that the crime does not go unpunished and the victim of crime as also the society has the satisfaction that justice has been done to it. In imposing sentences in the absence of specific

legislation, Judges must consider variety of factors and after considering all those factors and taking an overall view of the situation, impose sentence which they consider to be an appropriate one. Aggravating factors cannot be ignored and similarly mitigating circumstances have also to be taken into consideration. The measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenceless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment.

17. The Apex Court again noted in the case of **Sakshi** v. **Union of India**(supra) that the cases of child abuse and rape are increasing at an alarming speed and this is also common knowledge otherwise. The Apex Court also noted that an appropriate legislation in that regard is therefore urgently required.

18. This Court in the case of **Shantaram Nilkantha Meshram** v. **State of Maharashtra**(2002(1) Mh. L. J. 260) referred to the case of **Ippili Trinadha Rao** v. **State of Andhra Pradesh**(1984 Cri. L. J. 1254) wherein the Andhra Pradesh High Court had observed thus:-

> "The Court would be slow if not loathe to extend the benefit of the provisions of the Act in respect of offences committed on women viz. under Section 354 of the Code. If the beneficial provision of the Act is extended to the offenders like one punishable under Section 354 I.P.C. for outraging the modesty of a teen-aged girl and of like offences on women, would not only encourage further escalation of the crime, but also would become difficult to check or arrest the perpetration of those crimes and imperil the modesty of several innocent girls. Under those circumstances, the court has to be circumspect in extending the beneficial provision to the offences committed on the weaker section viz. Women".

19. Considering the facts of the above case where the accused was convicted under Section 354 I.P.C. for coming from behind and catching the breasts of the prosecutrix, this Court declined to extend the benefit of probation.

20. Deterrence remains as one of the foremost factors to be considered whilst imposing appropriate punishment. As George Saville would say "men are not hanged for stealing horses but that horses may not be stolen". Whilst sentencing it is not only the rights of the criminals which are to be looked into but also the victims of crime and society at large. The case at hand, is no ordinary case of outraging the modesty of a woman under Section 354 I.P.C. as is ordinarily understood. It is of its worst kind only falling short of rape, as presently defined. Considering the facts of the case and ever rising crimes such as these, as well as the nature of offence committed by the accused, it would

be inexpedient or inadvisable to extend the benefits of Section 3 or 4 of the Act, to the accused.

21. Accepting the alternate contention of the accused that would amount to releasing the accused with only a flea bite sentence and adding insult to the injury caused to the victim which is not called for considering the facts of the case.

22. Consequently, the revision application is hereby dismissed. The accused to surrender after four weeks to undergo the remaining sentence.

Expedite authenticated copy of the order.

N. A. BRITTO, J.

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